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IN THE

Supreme Court of the United States

October Term, 1965

No. 1144

World Wide Television Corporation
Lu-Gil Corporation and Gilbert Tucker,
Petitioners,

v.

Federal Trade Commission,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 21, 1965.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit is reported at 325 F. 2d 303.

CITATIONS TO OPINIONS BELOW.

The Opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, is reported in 352 F. 2d 303 (1965). The order of the Circuit Court of Appeals denying petitioners a rehearing is printed in Appendix B hereto.

JURISDICTION.

The opinion of the Court of Appeals for the Third Circuit was rendered on October 6, 1965, and a copy thereof is appended to this petition as Appendix A. A Petition for Rehearing was denied on December 21, 1965, and a copy of the order of denial is appended hereto as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTION INVOLVED.

Whether petitioners were accorded due process by the respondent Commission when the members thereof issued their written decision and order immediately following the close of counsel for petitioners' oral argument, respondent Commission having obviously determined the case and prepared its final order in advance of the oral argument.

STATEMENT OF THE CASE.

Petitioners are engaged in the business of selling television sets on terms whereby a buyer, instead of having to pay cash, or finance his purchase through the usual credit channels, can procure his set by depositing coins in a meter concealed behind the set. This plan is designed for those consumers who can't afford a large cash outlay, and who might have difficulty obtaining credit through a bank or finance company.

Petitioners have advertised the plan by newspapers and radio in order to reach the low-income consumer who would be the most probable customer for the plan. The advertising was geared to bringing out the appeal to these people and contained such terms as "no down payment", "no money down", "no banks, no finance companies", (prior to August 1, 1963); "only quarters a day" and "service guarantee included."

In fact, no "down" payment was required; payments amount to only "quarters a day"; and a guarantee is included in the purchase price. There is, however, an initial charge for delivery, installation, and, on occasion, sales tax. It is also true that as of August 1, 1963 petitioners had resumed discounting customers' notes with banks and finance companies with whom customers may have to deal. It should be noted however, that respondent Commission does not allege that the advertisements concerning banks and finance companies appeared after that date.

In this proceeding the Federal Trade Commission charged petitioners with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act by misrepresenting the selling terms, financing, service and guarantees for new and used television sets sold by them. The evidence was stipulated by the parties. That stipulation plus an addendum thereto and twenty-one Commission exhibits and the pleadings substantially constituted the record. From the record the Hearing Examiner made Findings of Fact. From those Findings the Examiner concluded that the acts and practices of petitioners were to the prejudice and injury of the public and of petitioners' competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Thereafter a cease and desist order was issued against petitioners.

Notice of Appeal therefrom having been duly given by petitioners, oral argument was scheduled thereon before the respondent Commission. At the appointed time for oral argument, it was presented by petitioners' counsel. Within a minute or two following the close of argument by petitioners' counsel, the members of the

respondent Commission served a typewritten "Final Order" on counsel for petitioners. The time elapsed was obviously too short to have permitted deliberation by the respondent Commission after the oral argument, or for preparation of the typed final order in that short interval of time.

The Findings, Conclusions and order of the Hearing Examiner were adopted by the Commission.

Thereafter petitioners filed a "Petition for Review and Order of Federal Trade Commission" in the United States Court of Appeals for the Third Circuit.

Petitioners orally and in their brief argued to said Court that certainly in the very short interval of a minute or two between the close of petitioners' argument and the return of the Commission to the Courtroom, it would have been impossible for the commissioners to consider the oral argument, and equally impossible to have prepared, and had typed, the final order, citing authorities.

The Per Curiam opinion of said Court filed October 6, 1965, (Appendix A hereto) makes no mention of the foregoing point.

Because of the failure of the said Court of Appeals to mention or discuss the foregoing point, petitioners filed a Petition for Rehearing to the said Court of Appeals pointing out the failure to refer or dispose of this point in the Opinion, and requesting a rehearing of the argument.

The Court of Appeals denied this petition (Appendix B).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has decided an important question of Federal Law, to wit, whether a Federal administrative body can predetermine a case before it, after having heard formal oral argument, but before there has been

any opportunity to consider the oral argument. This point has not been, but should be, settled by this Honorable Court.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, in that it has sanctioned such a departure by the Federal Trade Commission, an administrative agency of the United States, as to call for the exercise of this Honorable Court's power of supervision.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

As has been seen, oral argument was presented by petitioners' counsel to the members of the respondent Commission.

At the conclusion of the oral argument by petitioners' counsel, the members of the respondent Commission withdrew from the Courtroom. In a matter of a minute or two, they returned to the Courtroom with a typed final order signed by the Secretary of the Commission.

It is obvious that the respondent Commission had already made a determination of the case even prior to oral argument, and it is therefore equally obvious that the oral argument was an empty formality.

Certainly in the very short interval of a minute or two between the close of petitioners' argument and the return of the Commission to the Courtroom, it would have been impossible for the commissioners to consider the oral argument, and equally impossible to have prepared, and had typed, the final order.

In 2 American Jurisprudence (2d) 252 "Administrative Law" § 443, the rule is stated as follows:

> "An administrative tribunal, quasi-judicial in character as required to reach its determination after a hearing, may not make an arbitrary decision. In reaching its determination, the tribunal must consider all the relevant evidence, *and the argument*, reach its decision in accordance with the facts proved, and base its decisions upon the evidence alone." (emphasis supplied)

With respect to the phrase *"and the argument,"* the author cites *Morgan* v. *United States,* 298 U.S. 468, 30 L. Ed. 1288, 56 S. Ct. 906.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HYMEN SCHWARTZ
Counsel for Petitioners

GERBER, GALFAND & BERGER
Of Counsel

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,150

WORLD WIDE TELEVISION CORPORATION,
LU-GIL CORPORATION
AND GILBERT TUCKER,

Petitioners,

v.

FEDERAL TRADE COMMISSION

Argued: September 20, 1965
Decided: October 6, 1965

Proceeding on petition to review an order to cease and desist issued by the Federal Trade Commission. The Court of Appeals held that record sustained findings of Federal Trade Commission that seller had engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce by misrepresenting selling terms, financing, service and guarantees for new and used television sets.

Order affirmed and enforced.

SECTION 8.01. *Trade Regulation.* Record sustained findings of Federal Trade Commission that seller had engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce by misrepresenting selling terms, financing, service and guarantees for new and used television sets. Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45.

Hymen Schwartz, Philadelphia, Pa. (Gerber & Galfand, Philadelphia, Pa., on the brief), for petitioners.

Frank Gregory, Washington, D. C. (James McI. Henderson, Gen. Counsel, J. B. Truly, Asst. Gen. Counsel, Gerald Harwood, Washington, D. C., on the brief), for respondent.

Before McLaughlin, Hastie and Freedman, *Circuit Judges.*

PER CURIAM.

In this proceeding the Federal Trade Commission charged petitioners with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act by misrepresenting the selling terms, financing, service and guarantees for new and used television sets sold by them. The evidence was stipulated by the parties. That stipulation plus an addendum thereto and twenty-one Commission exhibits and the pleadings substantially constituted the record. From the record the Hearing Examiner made exhaustive Findings of Fact. From those Findings the Examiner concluded:

> "The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act."

Thereafter a cease and desist order was issued against respondents. The Findings, Conclusions and order of the Hearing Examiner were adopted by the Commission.

From our own examination of the record, we find that the Examiner's Findings were soundly based on the record and that his Conclusions are without error. The cease and desist order of the Examiner adopted by the Commission is entirely proper under the said Findings and Conclusions.

The order of the Commission will be affirmed and enforced.

APPENDIX B.

Present: KALODNER, *Chief Judge*, and MCLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

ORDER

The petition for rehearing again presents an unimportant point which was thoroughly considered and disposed of by the court though not specifically mentioned in the per curiam opinion.

The petition for rehearing is denied.

By the Court,
MCLAUGHLIN
Circuit Judge

Dated: December 21, 1965

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